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10 Attorneys for PLAINTIFFS

11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13 PETER J. VOGGENTHALER;  
14 VICTOR BECERRA; ARTHUR  
BODENDORFER; BRENDA C.  
15 CHAFFIN; MICHAEL J. SOLMI;  
JASON COWLES; JANE GAUTHIER;  
16 HONORE GAUTHIER; NIKOLAS  
KONSTANTINOU; DRAGAN  
17 KURAJICA; KENNETH LOWTHER;  
JAMES LUEHMANN; JACQUELINE  
18 LUEHMANN; RUTH  
MANNHEIMER; WILLIAM  
19 MONTERO; BARBARA MONTERO;  
CLIFFORD ROGERS; SHARON  
20 ROGERS; HERMANN ROSNER;  
MARKUS ROTHKRAZ; DANIEL  
21 SOLDINI; CHARLES WALKER;  
VERNA WALKER; JACK  
22 YENCHEK; OFELIA YENCHEK;  
RICHARD MALM; ROGER  
23 ELLSWORTH; JO ANN  
ELLSWORTH; MARGARET  
24 RUDELICH-HOPPE; PATRICIA  
MAHONEY, individually and as trustee  
25 for the MAHONEY LIVING TRUST;  
RICHARD FALEN; PETER  
26 LEARNED; KRISTIAN MEIER;  
ELIZA ACOSTA; MIRHA ELIAS;  
27 AIKO BERGE,

28 Plaintiffs.

Case No. 2:08-CV-1618

**PLAINTIFFS' STATUS REPORT  
AND REQUEST FOR DISPUTE  
RESOLUTION PER SECTION X  
OF THE PERMANENT  
INJUNCTION**

Judge: Hon. Robert C. Jones  
Date: September 25, 2014  
Time: 9:00 a.m.

1 vs.

2 MARYLAND SQUARE, LLC;  
3 MARYLAND SQUARE SHOPPING  
4 CENTER LIMITED LIABILITY  
5 COMPANY; HERMAN KISHNER dba  
6 MARYLAND SQUARE SHOPPING  
7 CENTER; IRWIN KISHNER, JERRY  
8 ENGEL, BANK OF AMERICA as  
9 Trustees for the HERMAN KISHNER  
10 TRUST; CLARK COUNTY SCHOOL  
11 DISTRICT; THE BOULEVARD  
12 MALL, as successor-in-interest/  
13 surviving corporation/ agent for  
14 BOULEVARD ASSOCIATES, L.L.C.;  
15 BOULEVARD MALL I LLC, as  
16 successor-in-interest/surviving  
17 corporation/ agent for BOULEVARD  
18 ASSOCIATES, L.L.C.; BOULEVARD  
19 MALL II L.L.C., as successor-in-  
20 interest/surviving corporation/ agent for  
21 BOULEVARD ASSOCIATES, LLC;  
22 CONSTRUCTION DEVELOPERS  
23 INC.; FEDERATED WESTERN  
24 DEPT. STORES, INC.; GENERAL  
25 GROWTH PROPERTIES; MELVIN  
26 SHAPIRO; SHAPIRO BROS.  
27 INVESTMENT CO.; DELIA'S  
28 CLEANERS OF ARIZONA, INC.; CB  
RICHARD ELLIS,

Defendants.

COME NOW PLAINTIFFS, by and through their counsel, Alexander Robertson, IV, Esq., and Jan A. Greben, Esq., who hereby submit this Status Report for the September 25, 2014 Status Conference.

### **STATUS REPORT**

NDEP and the Defendants have filed a Joint Motion to Approve Corrective Action Report ("CAR") (Dkt. 1046). NDEP's motion requests this Court to approve the CAR. The motion further states that once the CAR is approved by this Court:

*"NDEP then releases the Proposed Plan to the public for a comment period of not less than 30 days and holds a public meeting to present the information and respond to comments. [40 CFR] at §300.430(f)(3). NDEP then prepares a summary of the comments, criticisms, and new information submitted during the public comment period and a*



1 *response to each issue. Id. at §300.430(f)(3)(i)(F). The Proposed Plan*  
 2 *is neither a final agency decision nor selection of a final remedy. Any*  
 3 *significant changes in the preferred remedy are addressed in the*  
*Record of Decision ("ROD") or a revised proposed plan followed by a*  
*ROD." NDEP's Motion at p. 3:14-21.*

4 NDEP's motion further explains that "NDEP and the Kishner Defendants  
 5 request approval of the CAR so that the public comment period on the Proposed  
 6 Plan can be initiated as quickly as possible and run in tandem with the briefing  
 7 periods set forth in the Stipulation and Order Regarding Permanent Injunction (Dkt.  
 8 #1045). However, the public comment period does not run "in tandem" with the  
 9 briefing schedule set forth in the Stipulation. The Stipulation provides that "NDEP  
 10 shall submit the Proposed Plan to the Court for approval on or before July 28,  
 11 2014. Any party or person objecting to the Proposed Plan shall file and serve an  
 12 objection no later than August 18, 2014. Any response in support of the Proposed  
 13 Plan shall be filed on or before September 25, 2014. The Court will conduct a status  
 14 conference on September 25, 2014, for the purpose of considering the Proposed  
 15 Plan. If necessary, the Parties will present any evidence in support of or in  
 16 objection to the Proposed Plan at the September 25 hearing." (emphasis added).

17 First, the "briefing schedule" set forth in the Stipulation expired one week  
 18 before the Order was signed by this Court and has expired before the public  
 19 comment period has even begun.

20 Second, the Court cannot approve the Proposed Plan at the September 25<sup>th</sup>  
 21 status conference, because the Proposed Plan has not even been released to the  
 22 public for comment. As explained in NDEP's own motion, it only seeks approval of  
 23 the CAR at the September 25<sup>th</sup> status conference, so that NDEP can then release the  
 24 Proposed Plan to the public for a comment period of not less than 30 days pursuant  
 25 to 40 CFR § 300.430(f)(3). Thereafter, NDEP must prepare a summary of the  
 26 comments, criticisms and any new information submitted during the public  
 27 comment period and then response to each comment and criticism. *Id.* at §  
 28 300.430(f)(3)(i)(F). Therefore, it is inconsistent with both the terms of the

1 Permanent Injunction, 40 CFR § 300.430 and NDEP's own motion to "approve the  
2 Proposed Plan" at the upcoming September 25<sup>th</sup> status conference.

3 Third, Plaintiffs have both procedural and due process rights to object to the  
4 Proposed Plan, which cannot be abridged by any purported "approval" of the  
5 Proposed Plan at the September 25<sup>th</sup> status conference. As explained above, federal  
6 law requires NDEP to release the Proposed Plan to the public for comment for a  
7 period of not less than 30 days. To date, the Proposed Plan has not been release to  
8 the public for comment. Additionally, pursuant to the terms of the Permanent  
9 Injunction, Plaintiffs have the right to participate in the Dispute Resolution process  
10 defined in Section X of the injunction if they disagree with any decision, or failure  
11 to make a decision by NDEP pursuant to the Injunction. Plaintiffs have sent a  
12 Notice of Dispute to NDEP objecting to the CAR and the Proposed Plan, a copy of  
13 which is attached hereto. Pursuant to Section X of the Injunction, both NDEP and  
14 the Defendants shall have thirty (30) days or such time as the Court may require to  
15 respond to the Plaintiff's Notice of Dispute.

16 The Kishner Defendants have put the cart before the horse, and not even  
17 NDEP is asking this Court to approve the Proposed Plan at the September 25, 2014  
18 status conference. Plaintiffs respectfully urge this Court not to deviate from the  
19 terms of the Permanent Injunction and not approve the Proposed Plan at the  
20 upcoming status conference until such time as the public has had an opportunity to  
21 learn about the Plan and comment on same.

## 22 **REQUEST FOR DISPUTE RESOLUTION**

23 After more than ten (10) years of inaction by NDEP, the Plaintiff  
24 homeowners were forced to act as private attorney generals and bring this RCRA  
25 action to force the cleanup of contaminated shallow groundwater beneath their  
26 neighborhood, which has caused vapors from this hazardous waste to enter their  
27 homes through a process called "vapor intrusion." The Plaintiffs obtained a  
28



1 judgment against the Kishner Defendants, which resulted in this Court issuing a  
2 Permanent Injunction on December 27, 2010.

3 The Injunction established a series of deadlines for the Defendants and NDEP  
4 to conduct certain analysis, pilot studies of potential cleanup methodologies, and  
5 eventual cleanup of the contaminated groundwater beneath the Plaintiffs' homes.  
6 However, in every instance, the Defendants and NDEP have missed those deadlines  
7 by years without ever seeking permission from this Court to deviate from the  
8 deadlines imposed by the Injunction.

9 For example, the Permanent Injunction set a deadline of October 11, 2010 for  
10 the Defendants to submit a Corrective Action Plan ("CAP") for Groundwater to  
11 NDEP for approval. The draft CAP for Groundwater was submitted by the  
12 Defendants on October 24, 2011 - **one year late**. The Injunction also set a deadline  
13 for the Defendants to submit a Corrective Action Report ("CAR") one-hundred and  
14 eighty (180) days after NDEP's approval of the CAP for Groundwater. NDEP  
15 approved the Defendants' CAP for Groundwater on June 13, 2011, and NDEP set a  
16 deadline of June 29, 2012 for the Defendants to submit their CAR. However,  
17 Defendants did not submit this required report to NDEP until June 14, 2013, a full  
18 year after the deadline in the Permanent Injunction. That CAR was rejected by  
19 NDEP and the final version of the CAR is the subject of NDEP's motion (Dkt. 1046)  
20 set to be argued on September 25, 2014, more than two (2) years late!

21 **To date, no cleanup of the contaminated groundwater has begun more**  
22 **than fourteen (14) years after the contamination was first reported to NDEP,**  
23 **and nearly four (4) years since this Court issued the Injunction!** Meanwhile, the  
24 plume of hazardous waste has continued to migrate further east into new  
25 neighborhoods and the situation has become more dire.

26 Indeed, on February 21, 2014, NDEP issued a letter to the Defendants, which  
27 contained the ominous conclusion:

28

1           *"A new milestone was set in the fourth quarter, with the detection of*  
2           *10,000 micrograms per liter (ug/L) of PCE in the groundwater sample*  
3           *collected from well MW-14I. This is the highest concentration of PCE ever*  
4           *reported for groundwater at the site."*

5           To put this reading into context, NDEP has set a clean-up standard for  
6 groundwater of 100 ug/L in this area, meaning that nearly 4 years after this  
7 Injunction was issued, the concentration of PCE in the groundwater has increased  
8 100 times at that location adjacent to the former Al Philips dry cleaner site.

9           The Permanent Injunction also required the Defendants to "define the  
10 downgradient extent of the site groundwater plume containing more than 5 µg/l of  
11 PCE, identify any domestic wells within this plume, and take appropriate action to  
12 assure that the drinking water standards for PCE and its degradation products are not  
13 exceeded in these water supply wells." This work was supposed to have been done  
14 by the Defendants within sixty (60) days of the effective date of the Injunction, or  
15 by February 27, 2011. **However, despite confirmation from NDEP that there are**  
16 **domestic water wells on residential properties east of Eastern Avenue, neither**  
17 **the Defendants or NDEP have taken any apparent steps to survey the homes**  
18 **east of Eastern Ave. where the plume has now migrated, to determine if they**  
19 **are contaminated with this hazardous waste or to at least notify these**  
20 **homeowners that their water wells may be contaminated!**

21           At the one and only Community Meeting held by NDEP with the  
22 homeowners on October 26, 2010, NDEP represented that the remedial clean-up of  
23 the contaminated groundwater would start in the Summer of 2013, which deadline  
24 came and went.

25           Plaintiffs are informed that to date, the Kishner Defendants have spent  
26 approximately \$2,500,000 in investigation costs, of which only approximately  
27 \$600,000 has been spent on actual cleanup costs to dig up the contaminated soil at  
28 the site of the former dry cleaners and haul it off to a hazardous waste landfill.



1 NDEP's bureaucratic dithering has done nothing more than line the pockets of the  
2 Defendants' experts and done nothing to actually cleanup the contaminated  
3 groundwater beneath the Plaintiffs' neighborhood.

4 The PCE contamination was first reported to NDEP on November 29, 2000.  
5 For the next ten (10) years, NDEP ordered study after study of the PCE Plume, but  
6 took no legal action to force the Defendants to comply with Nevada and federal law  
7 to clean-up the contamination. It was the Plaintiffs, and not NDEP, which filed the  
8 RCRA action in federal court and obtained a judgment against the Defendants,  
9 resulting in the issuance of the Permanent Injunction. Unfortunately for the  
10 homeowners, this Court put NDEP in charge of the cleanup of the PCE  
11 contamination. Sadly, NDEP has done nothing more than order the Kishner  
12 Defendants to drill more monitoring wells, perform a failed pilot study and continue  
13 to issue quarterly reports tracking the migration and concentration levels of the  
14 contaminated groundwater as it marches beneath even more unsuspecting homes.  
15 **Now, NDEP has issued a Proposed Plan which adopts the very same cleanup**  
16 **methods which failed during the pilot studies conducted by the Defendants!**  
17 See, Letter from Peter Krasnoff, P.E., attached to hereto.

18 All the Plaintiffs ever wanted was to have the hazardous waste which has  
19 migrated beneath their neighborhood, through no fault of their own, properly and  
20 permanently removed. They have lived with the bureaucratic dithering by NDEP  
21 for the past fourteen (14) years waiting for this cleanup to happen. They took the  
22 responsible defendants to court and won a judgment and obtained a Permanent  
23 Injunction requiring the timely cleanup of their neighborhood. Sadly, nearly four  
24 more years have elapsed with no cleanup of the contaminated groundwater having  
25 even started. Now, NDEP has proposed a Plan which relies up methods of  
26 remediation which the Kishner Defendants' own experts have admitted failed during  
27 pilot tests. It appears that NDEP has simply given up its regulatory responsibility

28

1 and will rubber stamp even a cleanup method(s) which have already proven not to  
2 work during trial runs.

3 Pursuant to the Dispute Resolution provisions of the Permanent Injunction,  
4 Plaintiffs have served the attached Notice of Dispute on NDEP setting forth their  
5 strong objections to the Proposed Plan in advance of the public comment period  
6 even beginning. NDEP now has thirty (30 ) days to respond per Section X(B) of the  
7 Injunction.

8 Plaintiffs respectfully request this Court to continue this Status Conference  
9 for a period of sixty (60) days to allow the Dispute Resolution process contained in  
10 the Injunction to occur.

11 DATED: September 19, 2014

Respectfully submitted,

ROBERTSON & ASSOCIATES, LLP

13  
14 */ s / Alexander Robertson*

15  
16 Alexander Robertson, IV  
Nevada Bar No. 8642  
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19 Jan Adam Greben (CA Bar No. 103464)  
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20 1332 Anacapa Street, Suite 110  
Santa Barbara, CA 93101

21 *Attorneys for Plaintiffs*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of September, 2014, a copy of the foregoing document entitled **PLAINTIFFS' STATUS REPORT AND REQUEST FOR DISPUTE RESOLUTION PER SECTION X OF THE PERMANENT INJUNCTION** was filed and served by electronic means via this Court's CM/ECF system to:

**PLEASE SEE E-SERVICE MASTER LIST**

*/ s / Christine Barber*

An employee of the law firm of Greben  
& Associates

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# EXHIBIT "A"



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10  
11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13 PETER J. VOGGENTHALER;  
VICTOR BECERRA; ARTHUR  
14 BODENDORFER; BRENDA C.  
CHAFFIN; MICHAEL J. SOLMI;  
15 JASON COWLES; JANE GAUTHIER;  
HONORE GAUTHIER; NIKOLAS  
16 KONSTANTINOU; DRAGAN  
KURAJICA; KENNETH LOWTHER;  
17 JAMES LUEHMANN; JACQUELINE  
LUEHMANN; RUTH  
18 MANNHEIMER; WILLIAM  
MONTERO; BARBARA MONTERO;  
19 CLIFFORD ROGERS; SHARON  
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20 MARKUS ROTHKRAZ; DANIEL  
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21 VERA WALKER; JACK  
YENCHEK; OFELIA YENCHEK;  
22 RICHARD MALM; ROGER  
ELLSWORTH; JO ANN  
23 ELLSWORTH; MARGARET  
RUDELICH-HOPPE; PATRICIA  
24 MAHONEY, individually and as trustee  
for the MAHONEY LIVING TRUST;  
25 RICHARD FALEN; PETER  
LEARNED; KRISTIAN MEIER;  
26 ELIZA ACOSTA; MIRHA ELIAS;  
AIKO BERGE,

27 Plaintiffs,  
28

Case No. 2:08-CV-1618

**NOTICE OF DISPUTE PURSUANT  
TO SECTION X(A) OF THE  
PERMANENT INJUNCTION**

1 vs.

2 MARYLAND SQUARE, LLC;  
 3 MARYLAND SQUARE SHOPPING  
 4 CENTER LIMITED LIABILITY  
 5 COMPANY; HERMAN KISHNER dba  
 6 MARYLAND SQUARE SHOPPING  
 7 CENTER; IRWIN KISHNER, JERRY  
 8 ENGEL, BANK OF AMERICA as  
 9 Trustees for the HERMAN KISHNER  
 10 TRUST; CLARK COUNTY SCHOOL  
 11 DISTRICT; THE BOULEVARD  
 12 MALL, as successor-in-interest/  
 13 surviving corporation/ agent for  
 14 BOULEVARD ASSOCIATES, L.L.C.;  
 15 BOULEVARD MALL I LLC, as  
 16 successor-in-interest/surviving  
 17 corporation/ agent for BOULEVARD  
 18 ASSOCIATES, L.L.C.; BOULEVARD  
 19 MALL II L.L.C., as successor-in-  
 20 interest/surviving corporation/ agent for  
 21 BOULEVARD ASSOCIATES, LLC;  
 22 CONSTRUCTION DEVELOPERS  
 23 INC.; FEDERATED WESTERN  
 24 DEPT. STORES, INC.; GENERAL  
 25 GROWTH PROPERTIES; MELVIN  
 26 SHAPIRO; SHAPIRO BROS.  
 27 INVESTMENT CO.; DELIA'S  
 28 CLEANERS OF ARIZONA, INC.; CB  
 RICHARD ELLIS,

Defendants.

18 COME NOW PLAINTIFFS, through their attorneys of record Alexander  
 19 Robertson, IV, Esq. of Robertson & Associates, LLP, and Jan A. Greben, Esq., of  
 20 Greben & Associates, who hereby serve this Notice of Dispute upon the Nevada  
 21 Division of Environmental Protection of the Nevada Department of Conservation  
 22 and Natural Resources.

23 This Notice is served pursuant to Section X(A) of the Permanent Injunction,  
 24 filed on December 27, 2010 in this matter. The subject matter of the dispute is more  
 25 fully addressed in the attached letter from the Plaintiffs' expert, Peter Krasnoff, P.E.,  
 26 CEM, dated September 19, 2014 (Exhibit "1").

27 ///

28 ///



1 Pursuant to Section X(B) of the Injunction, NDEP has thirty (30) days, or  
2 such time as set by the Court, to respond to this Notice of Dispute.

3 DATED: September 19, 2014

ROBERTSON & ASSOCIATES, LLP

4  
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6 Alexander Robertson, IV  
7 Nevada Bar No. 8642  
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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of ROBERTSON & ASSOCIATES, LLP; that on the 19<sup>th</sup> day of September, 2014, I served true copies of the foregoing document described as **NOTICE OF DISPUTE PURSUANT TO SECTION X(A) OF THE PERMANENT INJUNCTION** on the interested parties in this action as follows:

**SERVICE LIST**

Wayne Klomp, Esq.  
Office of the Attorney General  
100 N. Carson Street  
Carson City, Nevada 89701  
email: [WKlomp@ag.nv.gov](mailto:WKlomp@ag.nv.gov)

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address [arusso@arobertsonlaw.com](mailto:arusso@arobertsonlaw.com) to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.



An employee of the law firm of  
Robertson & Associates, LLP

## Ann Russo

---

**From:** Ann Russo  
**Sent:** Friday, September 19, 2014 3:44 PM  
**To:** Wayne O. Klomp (Wklomp@ag.nv.gov) (Wklomp@ag.nv.gov)  
**Subject:** MARYLAND SQUARE -- RCRA  
**Attachments:** NTC DISPUTE\_20140919153722.pdf

Notice of Dispute Pursuant to Section X(A) of the Permanent Injunction.

Thank you,  
Ann ("Annie") Russo  
Legal Assistant to Alexander Robertson, IV, Esq.  
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# Exhibit 1



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September 19, 2014

Alexander Robertson IV, Esq.  
Robertson & Associates, LLP  
32121 Lindero Canyon Rd., Suite 200  
Westlake Village, CA 91361

Subject: Maryland Square Shopping Center, 3661 South Maryland Parkway, Las Vegas, Nevada

Dear Mr. Robertson:

Pursuant to your request, West Environmental Services & Technology, Inc. (WEST) has reviewed Nevada Division of Environmental Protection (NDEP) undated<sup>1</sup> *Proposed Plan for Cleanup of Groundwater* ("Proposed Plan") prepared for the Maryland Square Shopping Center at 3661 South Maryland Parkway in Las Vegas, Nevada ("the Site"). Based on our review, the *Proposed Plan* does not adequately present the bases and rationale for the selection of the proposed remedies for addressing tetrachloroethene (PCE) in groundwater emanating from the Site. In addition, the proposed remedies do not appear to be supported by the technical analyses presented in Tetra Tech's August 12, 2013 *Final Corrective Action Report for Groundwater* for the Maryland Square Shopping Center. It appears that the proposed remedy will not work, and that, if implemented, could increase the risk to the residential neighborhood. A discussion of the bases for our conclusions is presented below.

## 1.0 BACKGROUND

In August 2012, Tetra Tech, on behalf of the Herman Kishner Trust, submitted to NDEP its *Final Corrective Action Report for Groundwater*. Based on its technical evaluations, Tetra Tech recommended the use of ISCO, through injection of: (1) sodium or potassium permanganate; or (2) ozone with or without hydrogen peroxide. The ISCO injections were recommended to be conducted within the source area west of Maryland Parkway and within accessible portion of the Boulevard Mall property.

Following the submittal of the *Final Corrective Action Report for Groundwater*, NDEP has developed its *Proposed Plan* for the groundwater contamination at and emanating from the Site. Without providing supporting analyses or explanations to noted technical issues with the proposed remedial technologies, NDEP "proposes to prevent continued migration of the PCE-contaminated groundwater and to clean up the contamination using" a combination of: hydraulic containment through groundwater extraction and treatment (GWET) with *in situ* treatment with air sparge and vapor extraction (AS/VE) and/or *in situ* chemical oxidation (ISCO). The *Proposed Plan* does not include any actions to directly address subsurface vapors that have entered the indoor air within the residential community located above the groundwater contamination.

---

<sup>1</sup> The *Proposed Plan* is undated and does not appear to be in final form based on the blanks and highlighting of certain sections.

Alexander Robertson, IV, Esq.  
September 19, 2014  
Page 2



## 2.0 CLEANUP GOALS

The *Proposed Plan* identifies that long term indoor air remedial goals for the cleanup include PCE at  $9.4 \mu\text{g}/\text{m}^3$  and TCE at  $6.0 \mu\text{g}/\text{m}^3$ . However, the *Proposed Plan* neither explains the bases for these remedial goals, nor addresses the short-term exposure threshold for protection of pregnant women.

In 2011, the USEPA published its Toxicological Review of *Trichloroethylene in Support of the Integrated Risk Information System* (IRIS). The USEPA concluded that “women in the first trimester of pregnancy are one of the most sensitive populations to TCE short-term inhalation exposure due to the potential for heart malformation for the developing fetus.” To address the short-term exposure risk, USEPA “derived an inhalation RfC continuous inhalation exposure to TCE, which is 2 micrograms per cubic meter ( $2 \mu\text{g}/\text{m}^3$ ).” Therefore, the *Proposed Plan* should be modified to address the short-term indoor air protection criteria for TCE.

## 3.0 GROUNDWATER EXTRACTION

NDEP concludes in the *Proposed Plan* that a “well-designed groundwater extraction and above ground treatment system is a proven technology that will also prevent continued migration of PCE-contaminated groundwater into the neighborhood.” However, a “well-designed” groundwater extraction system should consider Site-specific available information on the hydrogeology.

As presented in the *Final Corrective Action Report for Groundwater*, in July and August 2012, Tetra Tech conducted pump tests west of the Boulevard Mall to “better evaluate the feasibility of groundwater extraction as a corrective action.” The tests revealed that “wells screened in the shallow water-bearing zone would produce water at very low flow rates, making them impractical for use in groundwater extraction for hydraulic control of PCE mass removal.” Tetra Tech’s evaluations concluded that “wells screened in the shallow water-bearing zone would produce water at very low flow rates making the impractical for use in groundwater extraction. Given the low pumping rates and the associated small capture zones, groundwater extraction for hydraulic control or PCE mass removal would be challenging within the Boulevard Mall property.”

Based on these findings, Tetra Tech concluded “groundwater extraction is not a recommended corrective action.” In contrast to Tetra Tech’s conclusion, and without supporting rationale, NDEP is recommending groundwater extraction as a primary component of the *Proposed Plan*. The *Proposed Plan* should be modified to explain how a groundwater extraction system will provide capture of the contaminated groundwater given the findings from Tetra Tech’s investigations

## 4.0 AIR SPARGING WITH VAPOR EXTRACTION

To “destroy” mass, NDEP has proposed the use of air sparging (AS) and vapor extraction (VE) as part of the *Proposed Plan*. However, NDEP does not address the noted limitations for implementing this technology at the Site.



Alexander Robertson, IV, Esq.  
 September 19, 2014  
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Tetra Tech had identified AS/VE as a potential remedial technology “pending proof of performance.” However, during investigations at the Site, a low permeable caliche layer was encountered. Due to the low permeable zone, Tetra Tech had requested that NDEP approve that AS/VE testing “be dropped from the upcoming field work because unfavorable subsurface conditions, consisting of caliche layer below the water table that had been confirmed during vertical delineation work.”

In evaluating the request to cancel the pilot test NDEP responded in August of 2012:<sup>2</sup>

“The NDEP agrees that trying to conduct air sparging beneath a laterally extensive and competent 2-foot thick layer of caliche is problematic...the vapor extraction system...may not be able to effectively capture the air sparged beneath the caliche. Therefore, sparging beneath the caliche may create fugitive vapors of PCE in the subsurface environment that are not adequately captured by the vapor extraction wells screened above the caliche layer. These **fugitive vapors may pose a human health risk.**” [emphasis added]

Based on these findings, Tetra Tech wrote in the *Final Corrective Action Report for Groundwater*, the “AS [air sparging] pilot test was eliminated after subsurface investigations within the pilot test area revealed layers of caliche and other fine-grained soils below the lowest observed water table. Caliche layers and clayey lenses are undesirable for AS with SVE.”

Because of the encountered conditions, Tetra Tech concluded in 2012 that “AS was not a viable treatment option.” Therefore, the *Proposed Plan* should be modified to explain how the occurrence of the caliche layer will not create problems for the implementation of AS/VE.

## 5.0 IN SITU CHEMICAL OXIDATION

The *Proposed Plan* also includes the use of ISCO with re-circulation wells for treatment of PCE-contaminated groundwater near Maryland Parkway. As part of the development of the *Final Corrective Action Plan for Groundwater*, Tetra Tech conducted pilot testing of ISCO. While initially, the results were favorable, showing decreases in concentrations of PCE, sampling conducted of the deep-screened monitoring wells “increased from nondetect (0.50 to 0.68 µg/l) to 710 to 160 µg/l in one well.”

As noted in the *Proposed Plan*, “[a]lthough results were initially promising, data collected from 3 to 12 months after injections appeared to show that PCE-contaminated groundwater had been displaced into previously clean areas. These results suggested that any cleanup technology involving injection of treatment chemicals must be paired with groundwater withdrawal to minimize the displacement of contaminated groundwater.”

NDEP has also concluded in the *Proposed Plan* that the effectiveness of the ISCO “is difficult to distinguish between destruction of PCE in groundwater and displacement of PCE-contaminated groundwater.” Therefore, given the noted limitations on groundwater capture with extraction wells, the *Proposed Plan* should provide an explanation how groundwater extraction could

<sup>2</sup> NDEP, Letter to Herman Kishner Trust, Maryland Square Shopping Center, SBIC and Maryland Square, LLC, Proposal for Changes in the Proposed Pilot Tests – Discontinuation of the Air Sparging and Soil Vapor Extraction Test, Al Philips the Cleaner (former), 3661 S. Maryland Parkway, Las Vegas, Nevada, Facility ID: H-000086, August 16, 2012 (NDEP, 2012).

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prevent further displacement of PCE-contaminated groundwater to the deeper zone to control ISCO injections.

## 6.0 SUMMARY

Prior to approving the *Proposed Plan*, the following technical issues should be addressed:

- The long-term remedial goal for indoor air of  $6 \mu\text{g}/\text{m}^3$  for TCE is not consistent with USEPA directives for protection of pregnant women and developing fetuses of  $2 \mu\text{g}/\text{m}^3$ .
- Air sparging was determined in the *Final Corrective Action Report for Groundwater* to “not be a viable treatment option;”
- NDEP concluded that air sparging “...fugitive vapors may pose a human health risk;”
- Pilot testing of ISCO resulted in displacement of contaminated groundwater to deeper-zones, making it difficult to determine whether this technology was effective in reducing concentrations or merely displacing the PCE-contaminated groundwater;
- Due to the noted limitations of groundwater extraction, there are no data to show that extraction combined with ISCO injections would control further displacement of PCE-contaminated groundwater to the deeper zones;
- Tetra Tech concluded that groundwater extraction for hydraulic control was “impractical” due to the very low flow rates from extraction wells, which make them “inefficient for groundwater extraction;” and
- The *Final Corrective Action Report Groundwater* concluded that “groundwater extraction is not a recommended corrective action.”

## CEM Statement

For the services provided and described in this document:

*I hereby certify that I am responsible for the services described in this document and for the preparation of this document. The services described in this document have been provided in a manner consistent with the current standards of the profession and to the best of my knowledge comply with all applicable federal, state and local statutes, regulations and ordinances.*

We appreciate the opportunity to provide our comments on the *Proposed Plan*. Please contact us if you have any questions or wish to discuss our comments.

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Sincerely,

A handwritten signature in blue ink, appearing to read "Peter M. Krasnoff".

**Peter M. Krasnoff, P.E., CEM**  
**Principal Engineer**  
**Nevada CEM 2151; Expiration April 24, 2016**

cc: Mary Siders, NDEP  
Jan Greben, Greben & Associates